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7 UNITED STATES DISTRICT COURT  
8 CENTRAL DISTRICT OF CALIFORNIA  
9 WESTERN DIVISION  
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11 ENIS Z. YENERIZ, ) No. CV 12-09759-VBK  
12 )  
13 Plaintiff, ) MEMORANDUM OPINION  
14 ) AND ORDER  
15 v. )  
16 ) (Social Security Case)  
17 CAROLYN W. COLVIN, Acting )  
18 Commissioner of Social )  
19 Security, )  
20 )  
21 Defendant. )  
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18 This matter is before the Court for review of the decision by the  
19 Commissioner of Social Security denying Plaintiff's application for  
20 disability benefits. Pursuant to 28 U.S.C. §636(c), the parties have  
21 consented that the case may be handled by the Magistrate Judge. The  
22 action arises under 42 U.S.C. §405(g), which authorizes the Court to  
23 enter judgment upon the pleadings and transcript of the Administrative  
24 Record ("AR") before the Commissioner. The parties have filed the  
25 Joint Stipulation ("JS"), and the Commissioner has filed the certified  
26 AR.

27 Plaintiff raises the following issues:

28 1. Whether the Administrative Law Judge ("ALJ") gave proper

1 consideration to the opinions of the treating physician; and  
2 2. Whether the ALJ gave proper consideration to Plaintiff's  
3 testimony.  
4 (JS at 4-5.)  
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6 This Memorandum Opinion will constitute the Court's findings of  
7 fact and conclusions of law. After reviewing the matter, the Court  
8 concludes that for the reasons set forth, the decision of the  
9 Commissioner must be reversed and the matter remanded.  
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11 I

12 **THE ALJ DID NOT ARTICULATE SPECIFIC AND LEGITIMATE REASONS TO**  
13 **REJECT THE OPINIONS OF PLAINTIFF'S TREATING PHYSICIAN, DR. KANENGISER**

14 Plaintiff's severe impairments consist of morbid obesity;  
15 probable degenerative joint disease of the bilateral knees; probable  
16 obstructive sleep apnea; and major depression. (AR 86.)

17 The ALJ assessed Plaintiff's residual functional capacity ("RFC")  
18 as including a restricted ability to perform light work as defined in  
19 20 CFR § 404.1567(b). The ALJ found that Plaintiff can stand and/or  
20 walk up to six hours in an eight-hour workday, and sit for up to six  
21 hours in an eight-hour workday. (AR 88.) Plaintiff takes exception to  
22 these findings, because his treating physician, Dr. Kanengiser, opined  
23 that Plaintiff would not be capable of these exertional activities.  
24 Dr. Kanengiser is, without dispute, Plaintiff's treating physician,  
25 and is thus entitled to have his opinions accorded "special weight,"  
26 while at the same time not being treated as necessarily conclusive as  
27 to either physical condition or the ultimate issue of disability. See  
28 McAllister v. Sullivan, 888 F.2d 599, 602 (9th Cir. 1989); Magallanes

1 v. Bowen, 881 F.2d 747, 751 (9th Cir. 1989). Indeed, it is well  
2 established in this Circuit that if the treating physician's opinion  
3 is controverted, it may be rejected only on the basis of articulated  
4 specific and legitimate reasons. (See Thomas v. Barnhart, 278 F.3d  
5 947, 957 (9th Cir. 2002); Magallanes, 881 F.2d at 751.) An ALJ may  
6 also reject the opinion of a treating physician if it is brief,  
7 conclusory or it is not adequately supported by clinical findings.  
8 Thomas, 278 F.3d at 957.

9 In this case, for reasons which are not clearly articulated in  
10 the Decision, the ALJ gave "some weight" to Dr. Kanengiser's opinions,  
11 which he included in the RFC findings. (AR 91-92.) As to the  
12 remaining limitations assessed by Dr. Kanengiser, specifically  
13 including the stand/walk and sitting limitations, the ALJ determined  
14 to accord them little weight, concluding that, "The assessment on its  
15 face lacks medically sufficient diagnostic bases for the extreme  
16 limitations assessed." (AR 92.) The ALJ believed that Dr.  
17 Kanengiser's progress notes "offer little, if any, clinical signs  
18 pain [sic] ... that would support the extreme exertional limitations  
19 as assessed." (Id.)

20 The ALJ instead accepted the stand/walk and sitting limitations  
21 assessed by a one-time consultative examiner, Dr. Karamlou, who  
22 examined Plaintiff on July 16, 2010. (AR 215-217.) Dr. Karamlou's  
23 very brief two-page report appears to reflect a correspondingly brief  
24 examination. There is only a passing reference to Plaintiff's knees,  
25 which Dr. Karamlou concluded revealed "some tenderness, but ranges of  
26 motion appear normal." Contrast this to Dr. Kanengiser's report, in  
27 which he summarizes his own objective testing as follows:

28 "There is evidence of left knee degenerative joint disease

1 with tenderness over the true knee joint, and slight  
2 tenderness on the right."

3 (AR 247.)

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5 Dr. Kanengiser also factored in Plaintiff's morbid obesity by  
6 noting that Plaintiff's limitations "are manifold and compounding.  
7 His morbid obesity has limited his physical activities due to severe  
8 knee pain, back pain, and dyspnea." (AR 248.) There is no discussion  
9 in Dr. Karamlou's report of any possible effects on Plaintiff's  
10 ability to stand and walk from his knee pain, or his obesity, which  
11 are documented.

12 The Court must therefore search for some possible reasons in the  
13 Decision supporting the ALJ's rejection of Dr. Kanengiser's  
14 conclusions, based on a "specific and legitimate" reasons basis.

15 The Commissioner's position is that the ALJ did provide specific  
16 and legitimate reasons to reject Dr. Kanengiser's opinions. The  
17 Commissioner points out that the ALJ found that there was no objective  
18 basis for Dr. Kanengiser's opinion that Plaintiff could not stand/walk  
19 for more than two hours in an eight-hour workday, or that he would be  
20 unable to perform any postural activities. (JS at 11, citing AR 92,  
21 257-258.) The Court does not find this position to be meritorious, in  
22 that Dr. Kanengiser is the treating physician, and in his February 22,  
23 2011 report, which provides the exertional limitations, he indicates  
24 that it is based on a comprehensive exam performed on January 19,  
25 2011. (AR 247.)<sup>1</sup> In any event, Dr. Kanengiser's progress notes (AR  
26 254-255) do not simply repeat Plaintiff's subjective complaints; they

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28 <sup>1</sup> If the ALJ felt that he required the actual examination test  
results, he should have developed the record by requesting them.

1 document ongoing treatment.

2 The Commissioner notes the ALJ's reliance on a history of  
3 conservative treatment, or lack of treatment, as a basis for  
4 depreciating the severity of Plaintiff's impairments. (See JS at 12-  
5 13.) For example, as to sleep apnea, although the ALJ diagnosed this  
6 as a severe impairment, Plaintiff was faulted for not pursuing  
7 treatment for that condition. (AR 91.) During the hearing, the ALJ  
8 asked Plaintiff about Dr. Kanengiser's recommendation that he would  
9 need a sleep study, and whether Plaintiff had undertaken this.  
10 Plaintiff's response was, "No, Your Honor. Can't afford it." (AR 55.)  
11 Plaintiff continued, "It's a significant amount of money and I, I  
12 don't have the money to do it." (AR 56.) At the outset of the  
13 hearing, Plaintiff testified that he has no income other than he might  
14 receive from family and friends as gifts. He stated that, "I just, I,  
15 my family gives me money to exist." (AR 35-36.)

16 There is no evidence in the record that Plaintiff had the  
17 financial ability to obtain the types of treatment which the ALJ  
18 believes would have successfully treated his impairments.<sup>2</sup> It is  
19 beyond question that if a claimant cannot afford medical treatment,  
20 the lack of that treatment cannot be held against the claimant. See  
21 Gamble v. Chater, 68 F.3d 319, 320-21 (9th Cir. 1995).

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24 <sup>2</sup> The Commissioner faults Dr. Kanengiser, and presumably  
25 depreciates the credibility of his opinion, by noting that Dr.  
26 Kanengiser failed to prescribe "pain or sleep medications." There is  
27 no medical evidence in the record in this case from a medical expert  
28 or any other source that sleep medications are an effective treatment  
for sleep apnea, or that pain medications can alleviate mobility  
limitations in an individual who suffers from morbid obesity and  
degenerative knee disease. The complexity and interrelatedness of  
Plaintiff's severe impairments should, on remand, be more carefully  
addressed by qualified medical professionals.

1 As Plaintiff persuasively argues in his Reply, what this issue  
2 boils down to is that there are two competing opinions: that of the  
3 treating physician, and that of the consultative examiner. What is  
4 absent in the Decision are specific and legitimate reasons to reject  
5 a critical portion of the treating physician's opinion, or even any  
6 persuasive reason to accept the contrary opinion of the consultative  
7 examiner. For this reason, the matter must be remanded for hearing.

## 8 9 II

### 10 **THE ALJ FAILED TO PROPERLY EVALUATE PLAINTIFF'S CREDIBILITY**

11 Plaintiff testified as to the effects of his physical  
12 impairments, in terms of substantial pain, and also the debilitating  
13 effects of his depression. The ALJ depreciated the credibility of  
14 Plaintiff's assertions, and the Court must determine whether that  
15 evaluation should be accorded deference. For the reasons to be set  
16 forth, the Court finds that the credibility assessment does not meet  
17 accepted standards.

18 The evaluation of a claimant's credibility is subject to well  
19 established case law and Regulations. Briefly stated, the ALJ must  
20 set forth clear and convincing reasons to reject pain limitation  
21 testimony. Smolen v. Chater, 80 F.3d 1273, 1281 (9th Cir. 1996);  
22 Dodrill v. Shalala, 12 F.3d 915, 918 (9th Cir. 1993). Further, there  
23 are enumerated factors which must be evaluated in the credibility  
24 assessment, which are set forth in 20 C.F.R. §§ 404.1529(c);  
25 416.929(c); and Social Security Ruling ("SSR") 96-7p. See also Sair  
26 v. Bowen, 885 F.2d 597, 603 (9th Cir. 1989).

27 The ALJ's evaluation of Plaintiff's credibility spans several  
28 pages of the Decision (AR 88-91), but a careful reading of the

1 discussion reveals that it relies upon a similar analysis that was  
2 utilized by the ALJ in depreciating Dr. Kanengiser's opinions. The  
3 ALJ numerous times comments on a lack of objective findings, a lack of  
4 treatment, or conservative treatment. Although the ALJ acknowledged  
5 Plaintiff's clear statement at the hearing that he could not afford  
6 such things as a sleep study (polysomnography), he was nevertheless  
7 faulted through a depreciated credibility assessment for not  
8 undergoing such a study. (AR 89.)

9 With regard to the ALJ's suspicion that Plaintiff voluntarily  
10 terminated his prior work for reasons other than debilitating  
11 impairments (AR 91), the fact is that the ALJ also found that  
12 Plaintiff could not perform his past relevant work because of his  
13 severe impairments. (AR 92.) Further, the fact that Plaintiff has  
14 looked for work (AR 91) cannot legitimately be used against him in a  
15 credibility assessment. (20 C.F.R. § 404.1574(c).)

16 All in all, the Court finds that the ALJ's credibility assessment  
17 is not based on allowable factors, and on remand, Plaintiff's  
18 credibility will be determined de novo.

19 For the foregoing reasons, this matter will be remanded for  
20 further hearing consistent with this Memorandum Opinion.

21 **IT IS SO ORDERED.**

22  
23 DATED: October 25, 2013

\_\_\_\_\_/s/  
VICTOR B. KENTON  
UNITED STATES MAGISTRATE JUDGE